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PACIFIC TELESIS
Group-Washington

June 27, 1994

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: *GN Docket No. 94-33, Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*

On behalf of Pacific Bell and Nevada Bell, please find enclosed an original and six copies of their *"Comments"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Alan F. Ciamporcero

Enclosures

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List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service providers	GN Docket No. 94-33

COMMENTS BY PACIFIC BELL AND NEVADA BELL

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SUMMARY

The Commission should not undermine its attempt to create regulatory symmetry by further forbearing as to only some CMRS competitors. The CMRS industry is on the brink of tremendous expansion. Avoiding unnecessary regulatory distinctions among competitors will allow all competitors to start at the same streamlined level of regulation. This will allow fair competition and market demand to determine the nature of the industry, rather than regulatory planning and fiat, or gaming of the regulatory process by parties. If the Commission follows this path, the result will be an industry that efficiently meets the needs of consumers and abundantly supports the national economy.

In addition to being contrary to Congressional intent to create full competition, forbearing for only small providers would discourage those providers from expanding since increased size would subject them to more regulation. This approach, accordingly, would discourage job creation by small companies and would limit the offerings of new or lower priced services to consumers. Attempting to determine which carriers fall into what category at any given time also would be an administrative nightmare for the Commission and the service providers. The Commission's suggested measurement factors illustrate some of the administrative problems. Worst of all would be the Commission's suggested measurement approach of determining whether to apply further forbearance based on an analysis of a CMRS provider's customer base, possibly including distinctions between "large and medium-sized and small business customers." With PCS, a customer may have one phone number for all calls. We could not distinguish between residential and business calls, let alone distinguish between large and small business customers. The CMRS market will quickly cause a breakdown of traditional classes of service.

The Commission requests comments on the type of data that parties believe would establish competition for purpose of using existing or future competition as a classification factor and asks parties to identify their share of the relevant market. Pacific Bell and Nevada Bell currently have no share of the CMRS market. Rather than dominance based on market share, however, emergent competition (with expanding output,

entry, and capacity) in the CMRS marketplace should remain central to the Commission's forbearance analysis.

The CMRS marketplace is experiencing rapid growth of output, entry, and capacity. In this type of market, the regulatory provisions in Sections 213, 215, 218, 219, and 220 are not needed and cause harm. Without enforcement of these regulatory provisions, competition will ensure that CMRS providers' rates and practices are reasonable and not unjustly discriminatory and, together with the complaint process, will ensure that consumers are protected. The public interest also supports forbearance. Although under these sections the Commission has not imposed affirmative obligations on CMRS providers, the potential for increased regulation is like a sword hanging over the providers' and potential providers' heads. The Commission should forbear in order to send a strong signal that it intends to avoid placing regulatory costs on providers and intends to allow full and fair competition to determine success or failure in the industry.

Not forbearing from these provisions could send negative signals. For instance, the reservation of authority under Section 213 for the Commission to make valuations of carrier property would retain the threat of burdensome and anticompetitive rate-of-return regulation, or price cap regulation with sharing. The reservation of authority to prescribe depreciation rates under Section 220 would retain the threat of slow depreciation lives, which frustrate the ability to compete in an industry with rapidly changing technology. Reservation of authority under Sections 219 and 220 would retain the threat that the Part 32 Uniform System of Accounts would be applied, even though it bears little or no resemblance to accounting systems used by competitive companies. The potential need to bear the costs and inefficiencies of complying with these regulations that may be established under these sections makes it harder for CMRS providers to fully streamline their operations and may discourage investment in CMRS and keep some competitors from entering the CMRS market. Accordingly the Commission should forbear from applying these sections for all CMRS providers.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service providers	GN Docket No. 94-33

COMMENTS BY PACIFIC BELL AND NEVADA BELL

Pacific Bell and Nevada Bell submit the following comments in response to the Commission's Notice of Proposed Rule Making ("NPRM"). The Commission requests comments on whether or not it should forbear from applying additional provisions of Title II to CMRS providers and whether or not it should forbear solely as to particular types of CMRS providers, including "small providers." In particular, the Commission seeks "comments on whether limiting further forbearance to only some CMRS providers would undermine regulatory symmetry and the regulatory scheme established in the Second Report and Order."[1] In our comments below, we explain why the Commission should forbear for all CMRS providers from Sections 213, 215, 218, 219, and 220 of the Communications Act.

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[1] NPRM, para. 9.

I. THE COMMISSION SHOULD CONTINUE ITS EVEN-HANDED FORBEARANCE

The Commission points out that its "forbearance authority permits differential regulation of CMRS providers."[2] While that certainly is correct, the Commission should not overemphasize that one provision of Section 332 of the Communications Act. As the Commission recognized in the Second Report and Order, the Congressional intent in creating Sections 3(n) and 332 of the Communications Act was to create "regulatory symmetry among similar mobile services."[3]

Limiting further forbearance to only some CMRS providers would undermine the regulatory symmetry established in the Second Report and Order. In that order, the Commission took two fundamental steps toward ensuring that regulation does not frustrate the efficient development of CMRS.

First, the Commission defined CMRS broadly so that all competing mobile providers are treated under the same federal regulatory framework. Second, the Commission forbore from requiring or allowing the tariffing of interstate CMRS offered by any service provider to any type of customer. These two steps help ensure fair, even-handed competition.

The Commission should not undermine its approach now by further forbearing only as to some CMRS competitors. The CMRS industry is on the brink of tremendous expansion. Soon PCS providers will compete with entrenched

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[2] Id.

[3] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, released March 7, 1994, para. 2 ("Second Report and Order").

cellular providers and other firms, including MCI/Nextel. In the face of this rapid expansion of competition, the Commission should continue to avoid regulatory distinctions among competitors. Avoiding unnecessary distinctions and regulations will allow all competitors to start at the same streamlined level of regulation. This will allow fair competition and market demand to determine the nature of the industry, rather than regulatory planning and fiat, or gaming of the regulatory process by parties. Efficient competitors who meet the demands of the market will flourish. Others may fail. If the Commission follows this path, the result will be an industry that efficiently meets the needs of consumers and abundantly supports the national economy.

A. The Commission Should Not Forbear Based On The Size Of The CMRS Provider Or On The Nature Of The Provider's Customer Base

The Commission seeks comments on whether or not it should forbear 1) for only small providers or 2) for only providers who serve predominantly business customers.[4] The nature of the CMRS marketplace makes these distinctions meaningless. All types and sizes of CMRS providers, serving all types and sizes of customers, will compete, not only directly but also via consortia, partnerships, and other business arrangements.

On the one hand, there is likely to be an increased convergence of types of mobile and other services into large networks. This is evidenced by the

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[4] NPRM, para. 32.

AT&T/McCaw merger proposal and the MCI alliance which includes the leading SMR, Nextel. In addition, many of the largest CMRS providers are expected to enter the PCS market, and there are likely to be numerous consortia of PCS providers. On the other hand, the Commission is encouraging small entities, rural telephone companies, and other "designated entities" to bid in auctions that will include PCS. The Commission acknowledges the complex interrelationship between small and large providers when it seeks "comments on how, if we establish standards applicable to [small] individual providers, should we treat affiliated corporations or operators of systems in more than one geographic area or providers who own multiple small systems."[5] The answer is that the Commission should not go down the path of making these distinctions.

In this type of market, making forbearance distinctions based on a provider's size or customer base would be arbitrary and would not meet Congress' objective to ensure 1) that similar mobile services are subject to consistent regulatory classification[6] and 2) that an appropriate level of regulation is established and administered for CMRS providers.[7] With these distinctions, the Congressional goals would fail because the Commission would not regulate mobile services that are similar to each other under one consistent classification, or apply an appropriate level of regulation. The identical mobile service would be regulated under Title II provisions for some providers, but not regulated under those provisions for other

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[5] NPRM, para. 35.

[6] See Second Report and Order, para. 13.

[7] See Id. at para. 14.

providers. The regulatory treatment of a provider's service would change whenever the size of the provider or its service, or a measurement of its customer base, rises above or drops below a certain threshold.

In addition to being contrary to Congressional intent to create full competition, this approach would discourage small providers from expanding since increased size would subject them to more regulation. This approach, accordingly, would discourage job creation by small companies. Discouraging expansion also would limit the offerings of new or lower priced services to consumers. For instance, the Commission's suggestion that number of channels might be used to measure the size of CMRS licensees[8] would discourage small firms from using new technologies aimed at providing more channels through more efficient use of the same bandwidth.

Attempting to determine which carriers fall into what category at any given time also would be an administrative nightmare for the Commission and the service providers. The Commission's suggested measurement factors illustrate some of the administrative problems.

For instance, the Commission tentatively finds that the Small Business Administration definition of small entity "is too generous for purposes of determining which CMRS providers are entitled to relief from remaining Title II obligations."[9] Yet, as the Commission acknowledges, that is the definition that the Commission used "to define small businesses entitled to preferences under the spectrum auction rules."[10]

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[8] See NPRM, para. 36.

[9] Id. at para. 34.

[10] Id.

Under differential regulation of substantially similar service based on size, the Commission would be adding definition on top of definition, and regulation would become increasingly complex and convoluted.

Even worse would be the Commission's suggested measurement approach of determining whether to apply further forbearance based on an analysis of a CMRS provider's customer base, possibly including distinctions between "large and medium-sized and small business customers."[11] With PCS, a customer may have one phone number for all calls. We could not distinguish between residential and business calls, let alone distinguish between large and small business customers. The CMRS market will quickly cause a breakdown of traditional classes of service. Trying to classify CMRS customers for purposes of regulation would be intrusive, speculative, and useless.

The Commission's suggestion that it "also might extend further forbearance to particular CMRS providers on a case-by-case basis"[12] is an invitation for extensive proceedings and regulatory gamesmanship by competitors who could more productively spend their time competing in the marketplace.

The Commission should avoid these quagmires that will produce nothing but waste, inefficiency, and anticompetitive wrangling for regulatory advantage. The Commission instead should take this opportunity, right before the expected surge in the CMRS market, to establish a simple system under which it regulates all CMRS providers on the same streamlined basis.

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[11] Id. at para. 37.

[12] Id. at para. 38.

The problem of a differential scheme of regulation is illustrated by Pacific Bell's situation. The cellular affiliate of Pacific Bell and Nevada Bell has been spun off, and Pacific Bell intends to offer PCS through a subsidiary. The subsidiary will start with no license for spectrum, no technology deployed, no billing system, no customers, and no revenue. Thus, if Pacific Bell's PCS subsidiary is successful in obtaining a PCS license, we will be a "small provider." But because our PCS subsidiary is owned by a large corporation, some competitors probably would incorrectly argue that we are a large provider in order to gain a regulatory advantage over us. We do not believe that this argument would be productive or sensible. We should start at the same streamlined level of regulation as all our competitors, large and small alike.

B. The Commission Should Not Forbear Based On a Dominant/Non-Dominant Market Share Test

The Commission requests comments on the type of data that parties believe would establish competition for purpose of using existing or future competition as a classification factor.[13] In this regard, the Commission also asks parties to identify their share of the relevant market.[14]

As noted, Pacific Bell and Nevada Bell currently have no CMRS market share and are clearly non-dominant in the CMRS marketplace. We will be just one provider among many, and we will face strong competition from well-entrenched CMRS providers, including AT&T/McCaw, AirTouch

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[13] Id. at n. 17.

[14] Id.

Communications, GTE Mobilnet, other cellular providers, and MCI/Nextel. These firms already have significant market shares. Market share determinations of CMRS providers' dominance or non-dominance, however, are an inappropriate means of determining whether or not to forbear as to those providers.

In the Second Report and Order, rather than applying a dominant/non-dominant test, the Commission was right to look at all relevant factors in deciding whether or not to forbear from Title II tariff requirements. The more comprehensive approach of the Commission is essential to meeting the goals of Congress to regulate all similar competitors the same and to place only necessary regulations on competitors in order to allow the emerging CMRS marketplace to be fully competitive and bring new, lower priced services to consumers.

Rather than dominance based on market share, emergent competition (with expanding output, entry, and capacity) in the CMRS marketplace should remain central to the Commission's forbearance analysis. In Docket 90-132, concerning competition in the interexchange market, the Commission recognized that "market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities."[15] The Commission found that "the relative supply capabilities of competitors in the market" may be "more indicative of the level of competition" than are market share data.[16] The Commission stated:

> Relative supply capabilities allow an assessment of supply elasticity, which refers to the ability of competitors in a market to meet additional demand, beyond that which they currently meet. Supply elasticities are important because even if one company

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[15] Competition in the Interstate Interexchange Marketplace, CC Dkt No. 90-132, Report and Order, 6 FCC Rcd 5880, 5890, para. 51 (1991).

[16] Competition in the Interstate Interexchange Marketplace, CC Dkt. No. 90-132, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, para. 51 (1990).

> enjoys a very high market share, it will be constrained from raising its prices above cost if its competitors have, or could easily acquire, the capacity to serve its customers at current price levels.[17]

Consistent with the Commission's analysis, the courts have found that in markets with ease of entry that are experiencing substantial entry and output expansion, "market share is not a good measure of market power."[18]

MCI/Nextel

Rapidly expanding entry, output, and capacity in the CMRS marketplace are aptly exemplified by MCI's $1.3 billion investment in the leading SMR, Nextel, announced February 28, 1994. According to MCI Chairman Bert Roberts, the MCI/Nextel/Comcast alliance is "bringing together partnerships that can make things happen quickly."[19] The joint corporate press release boasts that the deal jumpstarts MCI into PCS this year and brings "enhanced flexible services to consumers, business and government customers far sooner than generally had been expected...[Nextel's] first digital network is already serving customers in the Los Angeles area and will stretch across California within the next few months."[20] Nextel's Chairman, Morgan E. O'Brien, is quoted as saying that the "alliance means

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[17] Id. (emphasis added).

[18] See William M. Landes and Richard A. Posner, "Market Power In Antitrust Cases," 94 Harv. L. Rev. 937, 950 (1981).

[19] Jeannine Aversa, "MCI Enters The Wireless Communications Areas," San Francisco Examiner, March 1, 1994, at D4.

[20] Connie Weaver, "MCI Will Invest $1.3B in Nextel to Offer Nationally Branded Wireless Service," Corporate Release, February 28, 1994, at 1.

that everyone else will be playing catch up."[21] Investment analysts apparently agree. In response to MCI's announcement, a telecommunications analyst is quoted as saying that "all industry players are going to have to become more aggressive in offering wireless services in their local markets. 'There was never any incentive' before MCI's announcement, he adds. 'Now the pressure's on.'"[22]

Nextel already has invested "approximately $300 million" in California, and it began offering service in Los Angeles last year.[23] Nextel is positioned as the only provider of seamless mobile telephone service from Mexico to Oregon.[24] Nextel has converted its spectrum to advanced cellular-like services,[25] and Nextel

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[21] Id.

[22] Leslie Cauley, "MCI's Entry Adds New Dimension To Wireless Race; Marketing Muscle, Not Technology, Could Be The Determining Factor," Wall Street Journal, March 1, 1994, at B4.

[23] Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications ("CPUC Mobile Services Proceeding"), California P.U.C., I. 93-12-007, Nextel Opening Comments (February 25, 1994), p. 3.

[24] See, CPUC Mobile Services Proceeding, Comments of Contel (February 25, 1994), p. 28.

[25] For example, Nextel has begun to implement its Enhanced Specialized Mobile Radio ("ESMR") system that uses digital speech coding, Time Division Multiple Access transmission and frequency reuse that it asserts will yield a 50 times increase in the capacity of its existing SMR systems. See, In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC Dkt. No. 90-314, Nextel's "Reply To Oppositions To Petitions For Reconsideration" (January 13, 1994), pp. 1-2. Nextel receives financial support from Motorola, Northern Telecom, Matsushita, Comcast, and IPC. Its plan is to begin operations first in Los Angeles, then in the San Francisco Bay Area, with statewide access to follow in late 1994. See Competition and Open Access in the Telecommunications Markets of California, Dr. Peter Huber, (1993) attached as Exhibit A to Pacific Bell's Comments in the California PUC's Unbundling OIR proceeding, filed February 8, 1994, pp. 49-50 (hereinafter referred to as "Dr. Huber's Competition Report").

acknowledges that it will be a vigorous competitor nationwide in the near future, offering service in the top ten markets with access to 180 million people.[26]

Output

CMRS output has been booming for some time. The number of cellular customers has grown as much as 30% per year over the past few years.[27] PCS providers expect to see wireless growth continue as prices drop. Cellular prices in the United Kingdom dropped by 20-33% when PCS was introduced.[28] It has been estimated that there may be over 60 million PCS users nationwide in ten years.[29]

Entry

The CMRS marketplace is on the verge of tremendous new entry. With the aim of promoting competition with cellular providers and making PCS a "mass market" service, the FCC's PCS plan envisions as many as six licensees in each geographical area. Many new wireless providers will be very large, well-financed companies (e.g., most notably AT&T/McCaw, MCI, and many cable

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[26] Nextel Opening Comments, supra., n. 6.

[27] CPUC Mobile Services Proceeding, Bay Area Cellular Telephone Company Comments (February 25, 1994), pp. 5-6.

[28] See, CPUC Mobile Services Proceeding, Comments of Pactel Cellular (February 25, 1994), p. 51

[29] See, In Re Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Dkt No. 90-314, Notice of Proposed Rulemaking and Tentative Decision, 77 FCC Rcd 5676, 5688 (1992).

companies[30] including Cox Cable). Cellular companies also are likely to bid on licenses outside their current operating areas to expand their geographic coverage into areas already served by other cellular providers. All these "new" entrants will pose a very aggressive competitive challenge to the present cellular incumbents.

Capacity

CMRS capacity also is booming. The initial round of spectrum auctions will make available more than twice the spectrum currently in use. Over the next couple of years, NTIA will free up 50 more MHz, and make available an additional 150 MHz over the next 15 years.[31] New entrants to the wireless market will be able to choose from among many different backbone network facilities for backhaul and interconnection. These facilities will be made available by CAPs, cable companies, radiotelephone utilities, LECs, and IXCs (notably MCI). The FCC also has allocated additional spectrum to mobile satellite service competitors, and development in that market segment merits consideration in the evaluation of the wireless market.[32]

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[30] Cable companies have received more of the FCC's experimental licenses than all seven RBOCs combined. Dr. Huber's Competitive Report, p. 52.

[31] National Telecommunications and Information Administration, Preliminary Spectrum Reallocation Report, NTIA Special Publication 94-27 (February 1994), p. iii.

[32] In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, ET Dkt. No. 92-28, Report and Order, released January 12, 1994, para. 1.

Not only is new spectrum becoming available, but there are changes in radio technology that allow many more people to have access to wireless communications. Digital compression technology is expected to increase wireless capacity from five to twenty times over today's levels. The use of additional cells can provide virtually unlimited capacity.[33]

In sum, the CMRS market is changing now. New providers are building and expanding their networks. Wireless consumers have choices today and will have more choices of services and providers very soon. Unnecessary regulation is simply going to stand in the way of this development, and will increase costs to all providers, whether classified as dominant or non-dominant. A balance of market forces and regulatory monitoring of the market will best meet the Commission's goals of streamlining regulation, encouraging competition, increasing customer choice, decreasing prices, and curbing potential abuses.

II. THE COMMISSION SHOULD FORBEAR FROM APPLYING SECTIONS 213, 215, 218, 219, AND 220 OF THE ACT FOR ALL CMRS PROVIDERS

The Commission should forbear from applying Sections 213, 215, 218, 219, and 220 of the Communications Act for all CMRS providers. These sections, respectively, authorize the Commission to make valuations of carrier property, to examine carrier activities and transactions, to inquire into the management of a carrier and its owner, to require annual reports from carriers, and to prescribe the

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[33] See, Dr. Huber's Competition Report pp. 51-52.

forms of accounts, records, and memoranda to be kept by carriers, as well as depreciation rates.

As discussed above, the CMRS marketplace is experiencing rapid growth of output, entry, and capacity. In this type of market, the regulatory provisions in Sections 213, 215, 218, 219, and 220 are not needed and cause harm. Forbearance from these provisions is supported by Congress's three-part forbearance test, which allows forbearance when 1) enforcement of the provision is not needed to ensure that rates and practices are reasonable and not unjustly discriminatory, 2) enforcement of the provision is not needed to protect consumers, and 3) forbearing from enforcement of the provision is in the public interest.[34] Without enforcement of these regulatory provisions, competition will ensure that CMRS providers' rates and practices are reasonable and not unjustly discriminatory and, together with the complaint process, will ensure that consumers are protected.

The public interest also supports forbearance. Although under these sections the Commission has not imposed affirmative obligations on CMRS providers, the potential for increased regulation is like a sword hanging over the providers' and potential providers' heads. The Commission should forbear in order to send a strong signal that it intends to avoid placing regulatory costs on providers and intends to allow full and fair competition to determine success or failure in the industry.

Not forbearing from these provisions could send negative signals. For instance, the reservation of authority under Section 213 for the Commission to make valuations of carrier property would retain the threat of burdensome and anticompetitive rate-of-return regulation, or price cap regulation with sharing. The reservation of authority to prescribe depreciation rates under Section 220 would

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[34] 47 U.S.C. § 332(c)(1)(A).

retain the threat of slow depreciation lives, which frustrate the ability to compete in an industry with rapidly changing technology. Reservation of authority under Sections 219 and 220 would retain the threat that the Part 32 Uniform System of Accounts would be applied, even though it bears little or no resemblance to accounting systems used by competitive companies.[35]

There is no need to retain the threat of applying these sections to CMRS competitors. The potential need to bear the costs and inefficiencies of complying with regulations that may be established under these sections makes it harder for CMRS providers to fully streamline their operations and may discourage investment in CMRS and keep some competitors from entering the CMRS market. Accordingly the Commission should forbear from applying these sections for all CMRS providers.

III. CONCLUSION

For all the above reasons, the Commission should apply its forbearance in an even-handed manner, without distinctions among types of CMRS providers. The

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[35] The Commission already has decided not to exercise its authority under Sections 219 and 220 of the Communications Act with respect to CMRS providers that are not associated with LECs. Second Report and Order, paras. 192-193; NPRM, para. 11. Thus, competitors of a LEC's CMRS subsidiary are not required to use Part 32 accounting methods. A CMRS subsidiary of a LEC should not be subject to an account structure that does not apply to its competitors. See Petition For Clarification Or Reconsideration by Pacific Bell, p.5, Second Report and Order.

Commission should apply this even-handed forbearance to Sections 213, 215, 218, 219, and 220 of the Communications Act.

Respectfully submitted,

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Date: June 27, 1994